

DESERT VIPERS MOTORCYCLE CLUB ET AL.

IBLA 96-352, 96-353

Decided January 30, 1998

Appeal from a Decision of the California Desert District Office, Bureau of Land Management, denying permit to run a Barstow to Las Vegas motorcycle race during Thanksgiving weekend 1996 (November 30, 1996) and to defer consideration of future competitive events in desert tortoise habitat. CA-060-96-EA2.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Permits--Public Lands: Special Use Permits--Special Use Permits

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

2. Endangered Species Act of 1973: Section 7: Generally

The absence of a biological opinion from the U.S. Fish and Wildlife Service under the authority of section 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1994), does not preclude BLM from denying a permit for a motorcycle race when the denial is based on an environmental assessment showing that the anticipated impacts of the race, including cumulative impacts from holding the race in previous years, are unacceptably detrimental to a threatened species and its habitat.

APPEARANCES: Alan M. Ghaleb, Esq., West Hills, California, and Daniel T. Cooper, Yucca Valley, California, for Appellants; David Nawi, Esq., Regional Solicitor, and John R. Payne, Esq., Assistant Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, Sacramento, California, and Henri R. Bisson, District Manager, California Desert District Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Desert Vipers Motorcycle Club (Appellants) have appealed from a March 15, 1996, Decision by the California Desert District Manager (District Manager), Bureau of Land Management (BLM), denying Appellants a special recreation use permit to run the Barstow to Las Vegas (B-V) motorcycle race across public lands on November 30, 1996. Because the appeal presents an issue (application for a race) which is "capable of repetition, yet evading review," we do not dismiss it as moot. See Checker Motorcycle Club, 126 IBLA 251 (1993); Southern Utah Wilderness Alliance, 114 IBLA 326, 329-30 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207, 208-10 (1989).

The March 15, 1996, Decision ^{1/} denied Appellants' application and "defer[red] consideration of all future competitive OHV (off-highway vehicle) events in critical desert tortoise habitat within the California Desert Conservation Area (CDCA) Plan B-V corridor until regional planning and possible plan amendments can be completed." (Decision at 1.) The District Manager explained in his Decision that circumstances had fundamentally changed since the last B-V event in 1989. These changed circumstances included: (1) the listing of the desert tortoise as "threatened" under the Endangered Species Act (ESA) on April 2, 1990; (2) the designation of critical habitat by the U.S. Fish and Wildlife Service (FWS) on February 8, 1994; and (3) approval of the Desert Tortoise Recovery Plan by the FWS on June 28, 1994. (Decision at 1.) The District Manager stated that these changed circumstances made point-to-point motorcycle events within the existing CDCA Plan B-V corridor unfeasible. Id.

The District Manager further explained that his Decision to deny the application was

based on my conclusion that the race, as proposed, will cause significant and unacceptable adverse impacts on the environment.

This conclusion is drawn from the analysis of the 1996 B-V EA, the 1990 Decision Record and EA for the proposed 1991 race (proponent has reapplied for the same course and stipulations in 1996), and other National Environmental Policy Act (NEPA) documents prepared for the B-V event in prior years.

(Decision at 1.)

In explaining his Decision, the District Manager stated that all the reasons for denial of the 1991 race applied here. In that 1991 Decision Record, quoted in the 1996 Decision, the District Manager had stated:

^{1/} The District Manager's Decision is erroneously dated Mar. 25, 1996. Nevertheless, it was sent to all affected parties on Mar. 15, 1996, the date it was actually signed.

With the listing of the desert tortoise as "threatened" under the Endangered Species Act, the controversy over the environmental impacts has escalated * * * manageability, specifically compliance with stipulations, is a key consideration in my determination that the impacts of the proposed race are both significant and unacceptable. Furthermore, in my judgment, the evidence of significant adverse impacts to the environment as documented in the environmental assessment (EA) is sufficient to support denial of the proposed 1991 event without further consideration in an environmental impact statement [EIS].

(Decision at 2.) The District Manager, in this Decision, cited the difficulty in managing the event and explained that ensuring compliance with stipulations is a major concern to BLM. He further stated that unacceptable impacts to the desert tortoise and adverse modification of critical habitat would be likely to occur. (Decision at 2.) With regard to habitat, he noted that the 1994 Recovery Plan explicitly recommends against any competitive and organized OHV events on designated roads in Desert Wildlife Management Areas (DWMA's) which contain critical habitat. (Decision at 3.) Further, the District Manager explained that the 1996 proposed route followed the 1989 route which goes through desert tortoise habitat. The FWS "Conservation Recommendation" for the 1989 race was to investigate the feasibility of moving the race completely out of habitat for the desert tortoise. The District Manager noted that this conservation recommendation had become even more important now that the critical habitat for the desert tortoise had been designated. (Decision at 3.)

The District Manager also cited the unacceptable impacts to wilderness values from the motorcycle race that would likely result to adjacent wilderness units designated under the California Desert Protection Act of 1994 (CDPA), including Hollow Hills and Stateline and legislatively designated wilderness study areas at Soda Mountains and South Avawatz. In addition, the District Manager noted that about eight miles of the race course are within National Park Service (NPS) managed lands, and BLM has no authority to authorize competitive events within NPS lands. (Decision at 3.) Finally, the District Manager stated that the cumulative impacts to soils, vegetation, wildlife, and other resource values combined with the likelihood of impacts to a Federally listed species and its critical habitat did not make the proposed race a viable option. (Decision at 3-4.)

In their Statement of Reasons (Viper SOR) for appeal, Appellants argue that BLM's failure to follow proper procedures and failure to consider relevant factors constitutes an abuse of discretion. Appellants claim that BLM's denial of the Club's application and its ban of all future events in a critical habitat within the CDCA is a major Federal action requiring preparation of an EIS. (Viper SOR at 9-10.) Appellants urge that the denial under appeal departs from past policy without explanation or notification. For example, Appellants claim that BLM issued its final EA for the 1996 race without the benefit of a 30-day draft evaluation. (Viper SOR at 10-11.) Appellants also claim that BLM's EA violated the ESA by its

(BLM's) failure to obtain a biological opinion from FWS regarding the likelihood of harm to the desert tortoise or its habitat as a result of the planned motorcycle event. (Viper SOR at 11.)

In addition, Appellants claim the BLM Decision ignores the overwhelming evidence in favor of permitting the race and misapplies the ESA. (Viper SOR at 12-16.) Moreover, Appellants argue that in the Decision, BLM erroneously suggested new circumstances to justify not issuing a permit for the 1996 event. (Viper SOR at 17-18.) Finally, Appellants claim the record before this Board does not support a conclusion that the 1996 B-V race would have unacceptable environmental impacts, and thus BLM's Decision ignored relevant factors and was an abuse of discretion. In making this claim, Appellants urge that the objective record supports the conclusion that, consistent with the FWS biological opinion in 1989, the B-V motorcycle race poses no threat to the continued existence to the desert tortoise or its habitat. (Viper SOR at 19.)

Appellant Cooper, in his September 19, 1996, Statement of Reasons (Cooper SOR), adds several additional reasons why he believes the BLM Decision to deny the permit is invalid. Appellant claims that Congress improperly conferred unrestricted permit authority upon the Secretary of the Interior, because the Secretary was provided insufficient guidance for the exercise of that authority. (Cooper SOR at 17.) Cooper further asserts that special use permit regulations are void as they pertain to the permitting of races in a race corridor. (Cooper SOR at 19.) Third, Cooper asserts that race applicants should have been afforded a greater opportunity to respond to the EA before it became final. Had BLM allowed greater opportunity to respond, Cooper claims, race applicants "would have thoroughly disproved the false allegations made in the final EA before it was adopted." (Cooper SOR at 20.) Next, Cooper claims that BLM improperly performed quasi-legislative acts in denying the permit in the guise of an adjudicatory process. Appellant asserts that BLM improperly used the application for the 1996 B-V race to close all four race corridors in response to political pressures. (Cooper SOR at 21-22.) Fifth, Cooper claims that the BLM evaluation of the race permit application was not based upon plan amendment criteria as it should have been. Moreover, Cooper claims that since the 1982 amendment criteria were inadequate, the proposed B-V race could not be consistent with it. (Cooper SOR at 30.) Finally, Cooper claims that BLM was responsible for the preparation of an EIS and could not, therefore, prepare an EA to support its Decision to deny the 1996 B-V race application or to redesignate the race corridors. (Cooper SOR at 34-35.)

In its October 9, 1996, Response to Appellant Cooper (Oct. 9 Response), BLM avers that the March 15, 1996, Decision denying Appellants' application and deferring consideration of future competitive events in the desert tortoise habitat was made to protect the threatened desert tortoise and to promote efforts to recover the species. (Oct. 9 Response at 1.) As an initial matter, BLM justifies treating competitive events differently

from other forms of recreation on public lands. It explains that races are less controllable because of the competitive nature of the activities and they lead to different impacts. (Oct. 9 Response at 2.)

In answering Appellants' various allegations, Respondent BLM explains that its decision to deny a permit for the 1996 race was proper, based on current information available to BLM, that it represented a reasonable exercise of BLM's discretionary authority, and that it was based on a rationale similar to BLM's rationale for denying the proposed 1991 race, which was affirmed by this Board in American Motorcycle Association, District 37, 119 IBLA 196 (1991). (Oct. 9 Response at 2-5.)

Respondent explains that important events occurred during the decisionmaking process for the 1989 B-V race, and subsequent to it, and that BLM was obligated to take these factors into account in preparing the EA for Appellants' proposed 1996 race event. The first of these factors was the November 14, 1989, FWS Biological Opinion for the 1989 event that concluded "no jeopardy," but did not allow any incidental take of tortoises, and which assumed there would be compliance with race stipulations. A Conservation Recommendation included in that Opinion was that BLM investigate the feasibility of moving the race completely out of tortoise habitat. (Oct. 9 Response at 5.)

The BLM states that when FWS monitored the 1989 race, it found violations of race permit stipulations. See Oct. 9 Response at 5; Ex. 16 to Decision Record. The FWS thus concluded on December 5, 1989, that the impacts to desert tortoises and their habitat had been greater than planned or anticipated. The FWS again recommended examining an alternative race course out of the tortoise habitat. See Oct. 9 Response at 5. Subsequently, on April 2, 1990, the FWS listed the desert tortoise as "threatened." Later that same year, BLM denied Appellants' application for a permit for the 1991 race for the reasons set forth above. This was subsequently upheld by IBLA. See American Motorcycle Association, District 37, *supra*. The BLM further explains that on February 8, 1994, FWS published a critical habitat determination for the desert tortoise. Then on June 28, 1994, FWS completed the Recovery Plan for Desert Tortoise, Mojave Population, which recommended prohibiting competitive events on existing roads in DWMA's listed in the Recovery Plan. (Oct. 9 Response at 6; see Ex. 18 to Decision Record.) Finally, Congress passed the CDPA on October 31, 1994, designating the East Mojave National Scenic Area as the Mojave National Preserve and transferring jurisdiction from BLM to the NPS. Appellants had not secured the required authorization from NPS to utilize the 8 miles of the proposed course, which traversed the Mojave National Preserve. (Oct. 9 Response at 6.)

With regard to the challenged determination within the March 15, 1996, Decision which deferred consideration of future competitive events in the desert tortoise habitat, BLM claims the decision was made only after considering all relevant factors. As BLM stated in its response:

Any BLM decision which does not consider: (a) the listing of the desert tortoise as threatened; (b) critical habitat; and (c) the desert tortoise Recovery Plan would be "arbitrary and capricious." BLM's 1996 Decision Record shows that BLM relied on these and other factors in denying a permit for the 1996 B-V race and deferring consideration of competitive events in tortoise habitat. BLM made these decisions only after recognizing that the need to promote recovery of the tortoise goes beyond minimizing incidental take from individual competitive events. BLM's decision is driven by the recognized need to manage important desert tortoise habitat in a way that promotes recovery of the tortoise, and ultimate delisting of the species.

(Oct. 9 Response at 11.)

In responding on April 10, 1997 (April 10 Response), to the allegations of Appellants, BLM explains that it considered each of the relevant factors under the applicable law when it issued the Decision, and that it complied with its duties as a Federal agency under section 7 of the ESA. (April 10 Response at 3.) Equally important, BLM states that its determination to defer consideration of future applications for competitive OHV events in the critical desert tortoise habitat within the CDCA, until regional planning and possible plan amendments can be completed, is both reasonable and supported by this Board in Checker Motorcycle Club, *supra*. (April 10 Response at 3.)

In specific response to Vipers' claim that BLM departed from legally required procedures in denying the 1996 permit through a "de facto plan amendment," BLM states that this assertion is false and that BLM properly exercised its discretion for valid reasons in denying the special recreation use permit. (April 10 Response at 7-8.) The BLM further states that Appellant Vipers' claim that a site-specific EIS is required misapplies the law. (April 10 Response at 8.) Finally, BLM explains that nowhere has Appellant Desert Vipers Motorcycle Club shown that there was a legal requirement that a site-specific EIS be prepared and that Appellants have not shown that the environmental studies inadequately addressed relevant impacts. (April 10 Response at 9.)

[1] In his regulation of the public lands, the Secretary of the Interior is authorized to issue special recreation use permits pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1994). Regulations governing special recreation use permits are set forth in 43 C.F.R. Subpart 8372. In this regard, 43 C.F.R. § 8372.3 provides: "The approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer." If the proposed activity conflicts with BLM objectives, responsibilities, or programs for management of the public lands involved, BLM has discretion to deny a special use application. Checker Motorcycle Club, *supra*, at 254; Red Rock Hounds, Inc., 123 IBLA 314, 318 (1992); Patrick G. Blumm, 121 IBLA 169, 171 (1991); American Motorcycle Association, District 37, *supra*, at 199; Southern California Trials Association, 104 IBLA

141 (1988); Cascade Motorcycle Club, 56 IBLA 134 (1981); Whitewater Expeditions and Tours, 52 IBLA 80 (1981); Southern California Motorcycle Club, 42 IBLA 164 (1979).

Absent compelling reasons for modification or reversal, a rejection of an application for a special recreation use permit will be affirmed if the decision is supported by facts of record. Checkers Motorcycle Club, *supra*; Red Rock Hounds, Inc., *supra*; California Association of Four-Wheel Drive Clubs, Inc., 38 IBLA 361, 372 (1978), *aff'd*, California Association of Four-Wheel Drive Clubs v. Andrus, No. 80-5666 (9th Cir. Jan. 22, 1982).

In California Association of Four-Wheel Drive Clubs, Inc., *supra*, Appellants had challenged two decisions of the California State Director closing two corridors to OHV use in the California desert. In the closure area, one threatened and four endangered species were present. The BLM had ordered closure, citing the ESA, 16 U.S.C. § 1531 (1994), and NEPA, 42 U.S.C. § 4321 (1994). We stated at pages 367-68 of that decision:

Where conflicting uses of the public lands are at issue and the matter has been committed to the discretion of the BLM, the Board will uphold the decision of the BLM unless appellant has shown that the BLM did not adequately consider all of the factors involved, including whether less stringent alternatives would accomplish the intended purpose, or that there is sufficient reason to change the result. Cf. Questa Petroleum Co., 33 IBLA 116 (1977); Rosita Trujillo, 20 IBLA 54 (1975).

In this case, it is likewise clear that BLM's decision was based on a concern to prevent harm to the desert tortoise and its habitat, which are listed as "threatened" under the ESA, 16 U.S.C. § 1531 (1994). Given the critical habitat determination for the desert tortoise published by FWS on February 8, 1994, and the June 28, 1994, FWS Recovery Plan which recommended prohibiting competitive events on existing roads in DWMA's identified in the Recovery Plan, we believe BLM did consider all factors involved, and we further conclude that protection of the desert tortoise required denial of the Appellants' application. The BLM's March 15, 1996, Decision is based on facts of record and there are no compelling reasons to modify or reverse it. American Motorcycle Association, District 37, *supra*.

[2] We also disagree with Appellants' contention that the absence of a biological opinion from the FWS under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1994), precludes BLM from denying this permit application. Section 7(a)(2) of the ESA provides that

[e]ach Federal agency shall * * * insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected

states, to be critical * * *. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

The Federal courts have described a three-stage process for complying with the ESA. See, e.g., Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985); see also Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988). An agency proposing an action must first determine whether an endangered species may be present. Second, if such a species is present, the agency must prepare a biological assessment to determine whether the species is likely to be affected by the action. Finally, if the species would likely be affected, the agency must conduct a formal consultation with FWS, resulting in a biological opinion prepared by FWS. Id.

In American Motorcycle Association, District 37, supra, at 200, we held that while the FWS is responsible for providing a biological opinion as to whether or not a proposed action would likely jeopardize a listed species or its habitat, see 50 C.F.R. § 402.14(g), the biological opinion required by ESA is separate and distinct from the finding regarding the significance of impacts required under the authority of NEPA. We held that the BLM, not FWS, has the responsibility under NEPA to determine whether or not the impacts of proposed actions involving public lands and resources are significant. See 40 C.F.R. § 1501.4.

The record in this case, as in American Motorcycle Association, District 37, supra, shows that under the ESA, authorizing the race would likely result in "unacceptable impacts," (Decision at 2), to the desert tortoise or its habitat, and that under NEPA, such action could be expected to result in "[l]ong term reduction in plant cover and species diversity * * * within the race corridor." (EA at 17.) Therefore, BLM's Decision not to permit the race was in compliance with NEPA and the ESA. See American Motorcycle Association, District 37, supra, at 199-200; Sierra Club, 104 IBLA 76, 88 (1988).

In considering the record as a whole, the BLM's decision not to permit the 1996 race or consider future races until further study is accomplished is supported by the record, and requires no biological opinion from FWS. American Motorcycle Association, District 37, supra, at 200. As noted earlier, FWS had twice previously urged BLM to consider relocating the race out of the desert tortoise habitat. Moreover, the FWS study following the last motorcycle race approved through the corridor in 1989 found environmental impacts greater than planned or anticipated. Finally, in the race held in 1989, neither the participating organizers of the race nor BLM were able to enforce the protective stipulations included within the race plan to reduce adverse impacts on the desert tortoise or its habitat. For the reasons set forth above, we conclude that Appellants have failed to demonstrate error in BLM's March 15, 1996, Decision denying the permit application.

Appellant Cooper sought a hearing before the Board in this case. The grant of such a request is within the discretion of the Board. We determine that the relevant facts are before the Board, and thus there is no need for such hearing, and Appellant's request is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge